WARREN et al. *v.* GOODRICH et al.

June 15, 1922.

[112 S. E. 687.]

1. Contracts (§ 353 (7)*)—Evidence Held Not to Warrant Instruction on Changes in Building Plans, Making It Impossible to Calculate Effect on Contract Price.—In an action by contractors for the alteration of a building, an instruction that the written contract was abrogated, if the changes made at the direction of the owners so departed from the contract as to make it impossible to calculate the effect on the contract price, held not warranted by the evidence.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 718.]

2. Contracts (§ 353 (7)*)—Instruction that Impossibility of Calculating Effect of Changes in Building Contract Abrogated Contract Held Too Vague.—An instruction that a written contract for alterations of a building was abrogated, if the changes made by the owners so departed from the contract as to make it impossible to calculate the effect on the contract price was erroneous, as too vague and indefinite, and as permitting the jury to find the contract abrogated merely because the contractors failed to offer evidence to establish their case.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 716.]

3. Contracts (§ 296*)—Changes Do Not Abrogate Written Building Contract, unless the Result Cannot Be Recognized as the Same Building.—The test to determine whether the changes in the plans for a building abrogated the written contract is not whether the changes made it impossible to calculate the effect thereof on the contract price, but whether the building was so materially changed that it cannot reasonably be recognized as the same building as that provided for in the original contract.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 395.]

4. Trial (§ 296 (2)*)—Instruction Directing Verdict on Erroneous Standard Not Cured by Instruction Stating Correct Standard.—An instruction that a written building contract was abrogated, if the changes were such as to make it impossible to calculate their effect on the contract price, being complete in itself, in that it directed a verdict, was not cured by instructions, given at defendant's request, stating the correct standard.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 744.]

5. Contracts (§ 296*)—Deviations Do Not Abrogate Written Building Contract, unless Such Intention Is Clear.—Deviations from a written building contract, which are made by mutual consent, do not abrogate the contract, unless the mutual intention that they shall have that effect is apparent, or clearly shown by implication.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 395.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

6. Contracts (§ 350 (1)*)—Evidence Held Not to Show Intention to Abrogate Written Building Contract.—In an action by contractors for the reasonable value of alterations placed in a building, evidence held not to show any intention on the part of the owners, even of the owner who authorized most of the deviations from the written contract, to abrogate the written contract, especially where the contractors' counsel at the trial stated they relied on the contract as modified.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 459.]

7. Contracts (§ 238 (1)*)—Written Contracts Can Be Modified by Consent of the Parties, without Abrogation.—A written contract for the alteration of a building can be modified by consent of the parties, without abrogation of the contract, even though it contains no express provision permitting such modification, which provision is only necessary to avoid abrogation, where the changes are made by one of the parties without the consent of the other.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 395.]

8. Contracts (§ 353 (6)*)—Instruction, in Action on Building Contract, on Effect of Agreement as to Specifications Not Covered by Original Contract, Held Necessary.—Where the written contract for the alterations of a building made no reference to the specifications, which were submitted to the contractors after the contract was signed by one of the owners and one of the contractors, but before it was signed by the other contractor, and the specifications covered items which the plans did not cover, the jury should be instructed with respect to the practical bearing of the issue whether the specifications were or were not part of the contract.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 704.]

9. Contracts (§ 229 (1)*)—Rule for Determining Liability of Owner Ordering Extras to Building Contract Stated.—Where a written contract for the alteration of a building owned by four owners limited the maximum cost of such alterations, but during the progress of the work there were numerous deviations from the contract, made at the request of one of the owners, the liability of that owner is to be ascertained by deducting from the maximum contract price the reasonable saving of expense to the contractors resulting from omissions of work required by the contract, and adding thereto the reasonable expense incurred by the contractors for work in addition to that required by the contract.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 419.]

10. Tenancy in Common (§ 51*)—One Joint Owner Cannot Bind the Others to Contract for Alterations.—No one of the joint owners of a building could bind the others to any agreement with the contractors for alterations of the building, either express or implied, merely because of their relationship as co-owners.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 104.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

11. Contracts (§ 305 (2)*)—Mere Use and Enjoyment of Building by Landowner Is Not Acceptance of Alterations Made Therein.—The rule that the use of a chattel manufactured under contract is an acceptance thereof cannot be strictly applied to the case of a building erected on land which becomes the property of the landowner, and which, as a practical matter, he cannot reject, so that the mere use and possession of such building by the landowner does not alone establish acceptance.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 324.]

12. Contracts (§ 305 (2)*)—Possession without Objection May Raise Implied Promise to Pay for Alterations.—Possession by the landowner of an altered building on the premises, without objection as to its construction, may, under some circumstances, amount to such an acceptance of the work and materials as to raise an implied promise to pay therefor, and, in an action for such alterations, the jury should be instructed as to the evidence and effect of acceptance by the owners.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 324.]

13. Evidence (§ 558 (8)*)—Cross-Examination of Expert, Who Testified as to Value of Alterations in Building, as to His Success in Business, Is Too Broad.—Where a witness for the owners qualified as an expert by testifying he had been engaged in the building business for 50 years, and testified to the value of the work of the contractors, a question on cross-examination as to whether he had succeeded in business was too broad, and should not have been permitted, but the inquiry should have been confined to whether the witness had previously made any serious mistakes in such estimates as those about which he had testified.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 957.]

14. Witnesses (§ 270 (2)*)—Cross-Examination as to Reputation of Subcontractors, Not in Issue in the Case, Held Erroneous.—In an action by contractors to recover for alterations made in a building, where the work had been done principally by subcontractors, and the reputation of the subcontractors was not in issue, it was error to permit a witness for the owners to be cross-examined by the contractor as to the reputations of the subcontractors.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 957.]

Error to Corporation Court of Newport News.

Action by E. M. Goodrich and another, partners doing business under the firm name and style of the Goodrich Strip & Screen Company, against J. E. Warren and others. Judgment for the plaintiffs, and defendants bring error. Reversed, and new trial granted.

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Lett & Massie and *J. Winston Read,* all of Newport News, for plaintiffs in error.

Nelms, Colonna & McMurran, of Newport News, and *Tazewell Taylor,* of Norfolk, for defendants in error.

CLAY *v.* BUTLER et al.

June 15, 1922.

[112 S. E. 697.]

1. Guardian and Ward (§ 62*)—Evidence Held to Prove Agreement between Broker and Guardian that Broker Should Divide with Guardian His Commission for Selling Wards' Land.—In proceeding to confirm sale of wards' land, in which the court directed the commissioner to pay named broker 5 per cent. commission on the amount of the sales for his services in making the sale, but by subsequent decree ordered one-half of the amount of the commissions to be paid to the wards on the ground that agreement between broker and guardian requiring broker to divide his commissions with the guardian was illegal, evidence held to prove broker's agreement to divide commissions with guardian in the event that only 5 per cent. was allowed him for making the sale.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 803.]

2. Guardian and Ward (§ 62*)—Guardians Not Permitted to Make Profit Out of Ward's Property.—Guardians, being trustees, are not permitted to make gains to themselves of trust property in their hands.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 809.]

3. Contracts (§ 138 (1)*)—Opposed to Public Policy Will Not Be Enforced unless Enforcement Will Defeat Object of Illegal Transaction.—A contract opposed to public policy will not be enforced unless enforcement will defeat the object of the illegal transaction, and promote the interest of society and the policy of the law.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 333.]

4. Contracts (§ 142*)—Whether against Public Policy Is Question for Court.—Whether a contract is against public policy is to be determined by the court from all the circumstances of the case, and not by the jury.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 460.]

5. Equity (§ 377*)—Failure to Ask for Issue Out of Chancery Held to Constitute Waiver of the Right to Trial by Jury.—In proceeding involving question as to disposition of broker's commission for sale of wards' land, in which court ordered that one-half thereof be paid wards on the ground that broker's contract to divide commission with guardian was illegal, the broker by failure to ask for an issue out of chan-

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.